vestigations are continuing and that the Investigation Report are preliminary only.

But Kosatu's appeal has been dismissed and in the absence of an appeal, merits and special reasons, no stay of execution could be ordered. Nowhere in Encik Nordin's affidavit is there any prayer that the execution should be lifted. So if the Sheriff is to release, who should ask for the hand-over?

I was informed from the Bar Table that the three branches of Kosatu which the plaintiffs attached in Johore were not in the custody of any representatives of Ernst & Whinney at any material time. If the assets therein had been left alone their fate would have been problematical. By attaching, the plaintiffs had been diligent enough to protect their rights and equity must aid the diligent.

Going back to first principles, if a judgment creditor attaches goods which a Third Party lays claim, it is for that third party to give notice to the Sheriff (see Order 17 rule 2 of the Rules of the High Court and *Supreme Court Practice 1985* page 246). The Sheriff can then apply for relief and the appropriate order will be made.

I specifically asked Mr. Cyrus Das, Counsel for the Central Bank, if he would initiate such proceedings, but his response was that his clients were not yet ready to exercise that option. Indeed it was indicated that the option may not be exercised and the Central Bank may decide to "let it go."

It is trite law that if Kosatu is insolvent, it is open to any of its creditors and there are at least 52,000 of them to present a winding-up petition. Under the Regulation 9(1)(d) the Central Bank has the power to present a petition for winding-up despite anything in the Companies Act 1965. Proceeds realised from a sale of Kosatu's assets will then automatically fall to be distributed amongst Kosatu's creditors in accordance with their priorities.

In this kind of situation where the Central Bank itself is not making a claim to the goods seized, it would be wholly unreasonable to construe Regulation 7 as having the effect of putting Kosatu's assets willy-nilly into limbo until such time as the Central Bank decides to act. If a man saw a Director of this Co-operative removing cash out of the till after the freeze order was made, would he have committed an offence if he physically recovered the money and paid it into Court? Mr. C.K.G. Pillay submitted on the authority of *Public Prosecutor* v. *Oie Hee Koi*[6] that "any person" in Regulation 7(c) must mean any person acting without lawful excuse or authority. I agree. *Mens rea* is an essential ingredient here. The absence of any written approval of the Central Bank is superfluous because the Central Bank is a party to these proceedings and bound by any order which this Court makes. Being fully cognisant of the attachment if the Central Bank chooses not to assert its claim in the manner provided by the Rules of this Court, it is my view that the sale must proceed in the normal way. Kosatu's directors, who should be voiceless anyway, whom Mr. Saw claimed to represent cannot use Regulation 7 *in terrorem* against lawful claimants. Mr. Saw says that if these plaintiffs are allowed to sue, the other depositors will do likewise; as if that should not be allowed to happen. But they too have a legal right to sue. The law must take its course.

Since my order, an appeal to the Supreme Court has been filed in the name of Kosatu and a stay of execution has also been ordered. It is obviously in the public interest that this appeal be disposed off as quickly as possible.

*Order accordingly.*

Solicitors: *A.E. Ng & Co.; Ng Yook Woon, Andrew T.C. Saw & Co.; Shook Lin & Bok.*

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## HIGHLANDS MALAYA PLANTATIONS LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

**[A.C.J. (Harun J.) December 31, 1986]**

**[Kuala Lumpur – Tax Appeal No. A2/83]**

*Revenue Law – Income Tax – Group Bonus Scheme – Managerial staff – Commission or bonus payment – Interpretation – Whether deductible as an expense – Appeal by taxpayer – Income Tax Act, 1967, ss. 13, 33 & 39(1)(h).*

The appellant was a subsidiary of a company registered in the United Kingdom and was one of a group of 11 companies ("the Group") wholly owned by the principal company. The appellant and all companies in the Group were managed by agents and were in the plantation industry. All staff employed in the Group were engaged through standard letters of appointment and were transferable or interchangeable within the Group. Amongst its employees, there were two categories of staff *viz.* (a) the managerial staff (subject of this appeal) who, in addition to a monthly salary, were entitled to participate in the Group Bonus

Scheme, and (b) the clerical staff, who are not the subject of the appeal.

The question before the Special Commissioners was:

"Whether the additional remuneration paid to the administrative staff (*i.e.* the managerial staff) of the appellant under the scheme is a *commission* and therefore deductible as an expense wholly and exclusively incurred in the production of gross income of the appellant within the meaning of section 33 of the Income Tax Act, 1967; or is a *bonus* payment within the meaning of 39(1)(h) of the Act and therefore be disallowed as a deductible expense beyond the limits stipulated therein."

The Special Commissioners decided that the additional remuneration is a *bonus* payment within the meaning of section 39(1)(h) of the Income Tax Act, 1967 (as amended), and hence this appeal against the additional assessment of income tax amounting to $319,066.50 for the year of assessment 1975.

**Held**, allowing the appeal here and below with costs: (1) the real character of the Group Bonus Scheme is an incentive payment geared to performance and productivity and properly falls as an expense wholly and exclusively incurred in the production of gross income of the appellant within the meaning of section 33 of the Act;

(2) the word "bonus" appearing in section 39(1)(h) should be given its ordinary meaning and should not be stretched to include payments which are contractual and not gratuitous;

(3) the Revenue and the Special Commissioners were in error and the additional assessment must be discharged.

*Case referred to:*

(1). *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11.

TAX APPEAL.

*S. Woodhull* for the appellant.

*Zulkifli bin Ahmad Makinuddin* (Senior Federal Counsel) for the respondent.

*Cur. Adv. Vult.*

**Harun J.**: This is an appeal from the Special Commissioners of Income Tax against their Deciding Order in confirming the additional assessment of income tax amounting to $319,066.50 for the year of assessment 1975 raised by the respondent in 1980 on the appellant.

The appellant Company was a subsidiary of a company registered in the United Kingdom and was one of a group of 11 companies (the Group) wholly owned by the principal company. The appellant and all members of the Group were managed by Barlow Estates Agency Sdn. Bhd. (the Agent). All staff employed in the Group were engaged through standard letters of appointment. The staff so appointed were transferable or interchangeable within the Group. All the companies in the Group are in the plantation industry.

Amongst its employees, there were two categories of staff, *viz.*

(a) The managerial staff who, in addition to a monthly salary, were entitled to participate in the Group Bonus Scheme; and

(b) The clerical staff who, in addition to a monthly salary, were paid an annual bonus at the discretion of the appellant.

The Group Bonus Scheme was introduced in 1961. The scheme was based on a number of factors, *viz.* status of employees (based on responsibilities); amount of salary drawn; duration of service and planted acreage managed; for which points were given for equitable distribution of a provision created by reserving 4% of the agricultural profits of the Group; the amount of the payment varied with the number of points earned by each participant. The appellant reserved the right to –

(a) Withhold or reduce the amount due to any employee on an adverse report or on the person concerned terminating employment with the appellant; and

(b) Adjust the points in respect of any special qualification of any individual employee, *e.g.* service in the industry or other special qualifications.

Entitlement to participate in the scheme is one of the terms of employment contained in the standard letter of appointment issued to all managerial staff and therefore contractual. The appellant has been making payments under the scheme every year since 1961 and the amount for distribution varied from financial year to financial year depending on the agricultural profits of the Group.

The annual bonus paid to the clerical staff was at the discretion of the appellant, that is to say, there is no term in their contract of employment with the appellant that they are entitled to the payment of the bonus. For the last 12 years, however, the clerical staff received discretionary bonus payments annually in excess of two months' salary.

In 1975, the Income Tax Act 1967 (the Act) was amended by the addition of paragraph (h) to section 39(1) which reads:

"Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of –

(h) any sum paid by way of a bonus to an employee in excess of two-twelfths of his wage or salary."

In 1976, this additional provision was amended to read as follows –

"(h) any sum paid by way of bonus to an employee in excess of one thousand ringgit or two-twelfths of his wages or salary whichever is the greater."

The appellant does not dispute its liability to tax in respect of the bonus payments to its clerical staff in excess of two months' salary but disputes the applicability of section 39(1)(h) to the Group Bonus Scheme of the managerial staff.

The question before the Special Commissioners was:

"Whether the additional remuneration paid to the administrative staff (i.e. the managerial staff) of the appellant under the scheme is a *commission* and therefore deductible as an expense wholly and exclusively incurred in the production of gross income of the appellant within the meaning of section 33 of the Income Tax Act, 1967; or is a *bonus* payment within the meaning of section 39(1)(h) of the Act and therefore be disallowed as a deductible expense beyond the limits stipulated therein."

The Special Commissioners decided that the additional remuneration is a *bonus payment* within the meaning of section 39(1)(h). Hence this appeal.

The words "bonus" and "commission" are not defined in the Act. The general rule is that words in a statute should be given their ordinary meaning. The *Shorter Oxford* Dictionary defines –

*Bonus* – A boon or gift over and above what is normally due. A premium for services rendered or expected.

*Commission* – A *pro rata* remuneration for work done as agent 1725.

The Special Commissioners held that as commissions are only paid to agents and as the managerial staff of the appellant are employees, therefore these payments must be bonus, whether contractual or otherwise. Other reasons given for their finding are: the fact that the word "bonus" is used for the scheme and the appellant made no effort to change it; the fact that the Special Commissioners made similar decisions in three other cases and there has been no appeal against such decisions.

Section 13 of the Act contains general provisions as to *employment income* and subsection (1)(a) reads–

"(1) Gross income of an employee in respect of gains or profits from an employment includes –

(a) any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment;"

The Act clearly provides that commissions are payable to employees and not restricted to agents when it was first used in 1725. That the word commission does not have such a restricted meaning is well illustrated in *Mannix:* Australia Income Tax Law and Practice where reference is made to the word "commission." There, as here, the definition of income from personal exertion includes "commissions." There too, the word commission is not defined in the law. *Mannix* quotes a passage from a judgment which reads:

"In its relevant sense the word 'commission' has no technical meaning. The relevant sense of the word is, of course, its commercial sense, but we are satisfied that it has no precise meaning even in commerce. It is, of course, applied – and no doubt most frequently – to the ordinary remuneration of an agent in the form of a percentage on the value of business done. It is sometimes applied to remuneration received in that form by an employee. It is obvious, however, that the word is not confined in commerce to the remuneration of agents or employees, whether in the form of a percentage or otherwise ... It appears that commission may be earned merely by doing something which results in contracting parties being brought together: see Wharton's Law Lexicon – citing *Green* v. *Bartlett* (1863) 32 LJCP 261. We have formed the opinion that the word 'commission' is appropriate to describe any payment received as a reward for doing some act, or imparting some information in consequence of which the payer either does business or is enabled to do it."

In *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society*[1] Viscount Simon in the House of Lords said at page 25:

"It may be well to repeat two propositions which are well established in the application of the law relating to Income Tax. First, the name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an

annuity does not assist the taxpayer, any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature. The question always is what is the real character of the payment, not what the parties call it."

What then is the real character of the payments under the Group Bonus Scheme. Here the Special Commissioners found as a fact that the scheme is based on profits and the individual efforts put in by the managerial staff. It also found that the payments are contractual but went on to hold (at page 24) that the scheme

"merely provides a criteria by which the 'bonus' is paid ... Therefore it is logical that payment of bonus is tied to performance and profitability. On the other hand, the argument that this sort of payment be termed as 'commission' should not be upheld. Our view is based on the facts proved or admitted at the hearing and the general principles of law applicable therein."

In my view therein lies the fallacy of the thinking of the Revenue and the Special Commissioners. It is true that bonus is usually paid when a company makes a profit but it does not follow that bonus will be paid to employees each year the company makes a profit when there is no contractual obligation to pay as in the case of the clerical staff. On the other hand, there is a contractual obligation to pay out 4% of the agricultural profits of the Group to the managerial staff. The fact of sharing a percentage of the profits truly deserves the label of 'commission' rather than a 'bonus.' It seems to me that the real distinction between a commission and a bonus is that a commission is contractual whereas a bonus is gratuitous. It is a contradiction in terms to speak of a *contractual bonus* because bonus by definition is gratuitous and there cannot be a contract to do something which is not expected.

The trouble is that the word 'bonus' has been used too freely in contracts of employment in this country to denote a lump sum payment made each year in addition to wages or salary whether contractual or not. If the lump sum payable is a fixed sum or an amount certain and contractual it is in fact *deferred salary, e.g.* the 13th month salary, and should not be called a bonus. If the payment is not contractual then it is truly a *bonus.* If the payment is contractual, based on individual effort and in the form of a percentage as an incentive to productivity it is more appropriate to describe the payment as a *commission.* This system of incentive payments is familiar in the plantation industry and has been practised for many years *e.g.* amongst rubber tappers who, in addition to the fixed daily wage, are paid an "incentive bonus" for bringing in latex in excess of a fixed daily poundage. In introducing the scheme on September 21, 1960, the Agent said:

"It gives due reward to the senior and experienced men for their extra responsibility and knowledge and at the same time provides the new assistant with the incentive to prove himself a valuable member of the staff."

The real character of the Group Bonus Scheme is therefore an incentive payment scheme geared to performance and productivity and properly falls as an expense wholly and exclusively incurred in the production of gross income of the appellant within the meaning of section 33 of the Act. Indeed the correct approach to the question before the Special Commissioners is not whether the scheme is a commission or some other form of payment but rather whether it is a bonus or not within the meaning of section 39(1)(h).

The word bonus given its ordinary meaning is a gratuitous payment. The intention of the legislature in amending the law is to limit *ex-gratia* payments called bonus to a maximum equivalent of two months' salary by penalising the employer who pays in excess of the maximum in order to discourage the practice of enhanced bonuses against lower wages. I think it is fair to say that it is not the intention of the legislature to discourage employers from providing incentives to increase productivity and profits. I hold that the word 'bonus' appearing in section 39(1)(h) should be given its ordinary meaning and should not be stretched to include payments which are contractual and not gratuitous.

I accordingly find that the Revenue and the Special Commissioners were in error in deciding that the Group Bonus Scheme of the appellant is a bonus payment within the meaning of section 39(1)(h) of the Act. I would therefore allow the appeal and discharge the additional assessment of income tax for the year of assessment 1975 with costs here and below.

*Appeal allowed.*

Solicitors: *Shearn Delamore & Co.*